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No. 91-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. L. LOCKHART,
Director, Arkansas Department of Corrections,
Petitioner,

v.

BOBBY RAY FRETWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE OF THE STATE OF FLORIDA; VOLUNTEER LAWYERS RESOURCE CENTER FOR THE STATE OF FLORIDA; MISSOURI CAPITAL PUNISHMENT RESOURCE CENTER; OKLAHOMA CAPITAL PUNISHMENT POSTCONVICTION UNIT, INDIGENT DEFENSE SYSTEM; NORTH CAROLINA RESOURCE CENTER, OFFICE OF THE APPELLATE PUBLIC DEFENDER; PUBLIC DEFENDER OF INDIANA, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

This brief is filed with the consent of both parties.

Amici are public defense organizations and death penalty resource centers in states with capital punishment. Some *amici*, such as the Office of the Capital Collateral

Representative of the State of Florida (CCR), provide direct representation to indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in both the state and federal courts. *See* Fla. Stat. § 27.702 (1991) (CCR enabling statute). Other *amici*, such as the Missouri Capital Punishment Resource Center, provide litigation support and expertise to court-appointed and pro bono counsel in capital cases.

This brief addresses the applicability of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), to "weighing states" such as Arkansas which do not narrow the class of death-eligible cases at the guilt phase of bifurcated capital trials. *Amici* have had much experience working under capital punishment statutory schemes similar to Arkansas'.

SUMMARY OF ARGUMENT

The state presents the question before this Court as one of ineffective assistance of trial counsel. The state relics upon *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and its precursors to support Mr. Fretwell's conviction and condemnation for felony murder, arguing that counsel was effective because he anticipated *Lowenfield* and its implications for Arkansas. An important subsidiary question presented is whether the rules laid down in *Lowenfield* for Louisiana govern in Arkansas.

Lowenfield v. Phelps approved one state's modern death penalty scheme: Louisiana's statute, which narrowed the death-eligible class at the guilt stage by adopting a form of heightened first degree murder. Arkansas has a quite different modern system for deciding who dies. Arkansas retained its traditional definitions of first degree murder (premeditated murder and felony murder) and performed the narrowing function at the sentencing stage by using aggravating circumstances—one of which is pecuniary gain.

Bobby Ray Fretwell was convicted of felony murder, based on the predicate felony of robbery. An essential

element of robbery was the intent to obtain money. He was then sentenced to die, based on a lone aggravating circumstance—pecuniary gain, an essential element of the felony murder conviction.

Application of *Lowenfield* to Arkansas' capital sentencing scheme ignores two critical and independent differences between the statutes of Arkansas and Louisiana. First, unlike the Louisiana statute considered in *Lowenfield*, Arkansas does not meaningfully narrow the class of death-eligible cases at the guilt phase. In Arkansas, the state may not use an element of the capital crime as an aggravating circumstance. *E.g., State v. Middlebrooks*, No. 01-5-01-9102-CR-00008 (Tenn. Sept. 8, 1992) (copy available from counsel), slip op. at 51-67; *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). Second, again unlike the Louisiana statute at issue in *Lowenfield*, Arkansas is a weighing state. The distinction between weighing and nonweighing statutes matters for purposes of *Lowenfield*. *Stringer v. Black*, 112 S. Ct. 1130, 1136-38 (1992).

Should the Court agree with *amici* that *Lowenfield* does not govern weighing states like Arkansas, the merit of Mr. Fretwell's ineffective assistance of counsel claim becomes clear and powerful. Without any conceivable competing strategy, counsel failed to argue compelling authority that would have rendered his client ineligible for death. This is a classic example of the kind of global attorney error that, standing alone, establishes a prejudicial violation of the sixth amendment under *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *E.g., Curry v. Zant*, 371 S.E.2d 647 (Ga 1988) It is difficult to conceive of a trial lawyer's legitimate reason for not raising an objection which, if granted, would have rendered her client non-death-eligible;[1] imagine, for example, a defense law-

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[1] Invalidation of the sole aggravating factor in his case would render Mr. Fretwell ineligible for the death penalty. *Cf. Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992) (observing that "sensible

yer in a capital rape case not objecting based on *Coker v. Georgia*, 433 U.S. 584 (1977). In analyzing Mr. Fretwell's ineffectiveness claim, *amici* respectfully ask the Court not to assume, as the eighth circuit assumed in this case, that *Lowenfield* governs capital sentencing schemes materially different from Louisiana's.

ARGUMENT

IN A WEIGHING STATE THAT DOES NOT NARROW THE CLASS OF DEATH-ELIGIBLE CASES AT THE GUILT PHASE OF BIFURCATED CAPITAL TRIALS, SIMPLY REPEATING ELEMENTS OF FELONY MURDER AS AGGRAVATING CIRCUMSTANCES FAILS TO GENUINELY NARROW AND GUIDE SENTENCING DISCRETION.

As framed by the state's certiorari petition, this case presents a question of ineffective assistance of trial counsel: whether Bobby Fretwell was denied the right to effective assistance of counsel at the sentencing phase of his capital case "when his trial counsel failed to make a 'double counting' objection based on the Eighth Circuit's holding, in *Collins v. Lockhart*," 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013 (1985), in "light of the fact that *Collins* had been decided contrary to this Court's joint opinion in *Jurek v. Texas* and *Lowenfield v. Phelps*, and was subsequently overruled by the eighth circuit." Brief for Petitioner, at i (citations omitted).[2]

meaning is given to the term 'innocent of the death penalty' by allowing a showing, in addition to innocence of the capital crime itself, that there was *no aggravating circumstance or that some other condition of eligibility had not been met*") (emphasis added).

[2] A constitutional claim based on *Collins v. Lockhart* was raised on Mr. Fretwell's direct appeal, but the Arkansas Supreme Court held the issue procedurally barred. *Fretwell v. State*, 708 S.W.2d 630, 634 (Ark. 1986). Any procedural default should be forgiven, because invalidation of the lone aggravating circumstance in Mr. Fretwell's case would render him ineligible for, and thus "innocent" of, the death penalty. *Sawyer v. Whitley*, 112 S. Ct. at 2522.

In *Collins*, the eighth circuit had held that Arkansas' use of an aggravating circumstance that duplicates an element of the crime itself violates the eighth amendment. The state argues that *Collins* was wrong when decided, because it was contrary to *Jurek v. Texas*, 428 U.S. 262 (1976), and that *Collins* was effectively overruled by *Lowenfield v. Phelps*.

Arkansas' capital sentencing scheme differs from the systems at issue in *Lowenfield* and *Jurek* in two critical and independent respects: Arkansas does not narrow the death-eligible class at the guilt stage, and Arkansas does require the jury to weigh aggravating against mitigating circumstances at the sentencing stage. Because *Jurek* is important only as a precursor of *Lowenfield*, this brief will focus on *Lowenfield* and on the applicability of *Lowenfield's* analysis to Arkansas.[3]

A. *Lowenfield v. Phelps*

In *Lowenfield v. Phelps*, 484 U.S. 231, 234 (1988), the Court upheld a Louisiana death sentence where the sole aggravating circumstance found by the jury was identical to an element of the capital murder statute. The defendant had been convicted of three counts of first-degree murder, an essential statutory element of which was a finding of his specific intent "to kill or inflict great bodily harm upon more than one person." *Id.* Only this finding at the guilt phase made the murder first-degree, rather

[3] *Lowenfield* addressed the issue of "double counting," and thus is the case most central to the logic of the state's *Collins v. Lockhart* argument. The state's brief emphasizes *Jurek* rather than *Lowenfield*, almost certainly because of the time framing aspects inherent to Mr. Fretwell's ineffective assistance claim. As to the guilt stage narrowing dimension of Mr. Fretwell's case addressed by this *amicus* brief, *Jurek* adds nothing to *Lowenfield's* analysis. *Cf.* Brief for Petitioner, at 56 ("in *Lowenfield* this Court has done nothing more routine than apply *Jurek v. Texas*").

than second-degree.[4] In the sentencing phase, the jury found the aggravating circumstance that the defendant had "knowingly created a risk of death or great bodily harm to more than one person." *Id.*

The Court held that the duplicative nature of the statutory aggravating circumstance did not invalidate the sentence. The majority opinion noted that this particular statutory scheme appropriately narrowed the group of those eligible for the death penalty at the guilt phase, rather than the sentencing phase, and reasoned that the scheme was constitutional so long as this narrowing occurred *somewhere* along the way.

Because Louisiana performed the narrowing function at the crime-definitional phase, and because Louisiana capital sentencers were not directed to weigh aggravating and mitigating circumstances at the sentencing stage, the *Lowenfield* Court permitted Louisiana to use an element of a capital crime as an aggravating circumstance. *Lowenfield* thus reinforced the unexceptional idea, first expressed in *Jurek v. Texas*, that a state legislature *could, if it so chose*, narrow the class of death eligible cases at the guilt phase by sufficiently narrowing its definition of capital murder, and by dispensing with further narrowing at the sentencing stage. The Constitution does not require that narrowing occur at both phases of trial.

B. The Constitutional Minimum for All Capital Punishment Systems: Genuine Narrowing of the Class of Death-Eligible Cases, at Either the Guilt Phase or the Sentencing Phase.

A capital statute that authorized death for all traditional first degree murderers would surely violate the requirements of *Furman v. Georgia*, 408 U.S. 238 (1972). These were the very standardless statutes held unconsti-

[4] Under Louisiana law, aggravating circumstances are used to elevate homicides from second to first degree murder. *Stringer v. Black*, 112 S. Ct. 1130, 1138 (1992).

tutional in *Furman* itself. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1107-1108 (1990). The eighth and fourteenth amendments require more.

For a capital statute to pass constitutional muster, a state must devise "means genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Stringer v. Black*, 112 S. Ct. at 1138 (quoting *Lowenfield v. Phelps*, 484 U.S. at 244-45). The Court required states to adopt procedures that genuinely narrow the sentencer's consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. Although there is "no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of trial or the guilt phase," *Stringer, id.* (quoting *Lowenfield, id.*), the Constitution demands that it be performed *at some point* in the bifurcated trial process.

The requisite narrowing must be of two sorts: numerical and qualitative. Rosen, *supra*. The former is self explanatory; the latter requires that the members of the narrowed class in fact be the most culpable offenders.

Numerical narrowing is a constitutionally necessary first step under the eighth amendment. *Pully v. Harris*, 465 U.S. 37, 50 (1984) (describing the "constitutionally necessary narrowing function"). "A state first must narrow the class of homicide defendants who are eligible for the death penalty to ensure that even if some materially depraved murderers manage to avoid the death penalty, those chosen will, at least, be among the worst offenders. This [quantitative] narrowing, however, is insufficient by itself to satisfy the Eighth Amendment." *Tennessee v. Middlebrooks*, No. 01-5-01-91-9102-CR-00008 (Tenn. Sept. 8, 1992), slip op. at 56 (citing Rosen, *supra*, at 1108).

A state must not only "genuinely narrow the class of [death-eligible] defendants," but it must do so in a way that "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).[5] As the Tennessee Supreme Court recently recognized, this qualitative narrowing is as required as numerical narrowing is. A state "must not only genuinely narrow the class of death-eligible defendants, but it must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendants compared to others guilty of murder." *Middlebrooks*, *supra*, slip op. at 58.

A properly applied narrowing device therefore provides a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not," *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980), and must "differentiate this [death penalty] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879. Such a device theoretically supplies a rational penological basis for executing one defendant and not another, and thus gives at least some, albeit incomplete, measure of assurance that a state is applying the death penalty proportionally. "Even if some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers—those whose crimes are particularly serious or for which the death penalty is peculiarly appropriate." *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring).

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[5] The *Zant* decision made clear that this narrowing function was the only constitutionally required role to be played by aggravating circumstances in state sentencing systems which employ aggravating circumstances. However, states may assign a larger role to aggravating circumstances and, where they do so, the eighth amendment may be implicated if arbitrariness is allowed to creep in.

The critical role played by this narrowing requirement is especially significant in light of the discretion which the Court mandates for the capital sentencing body, be it judge or jury. *Middlebrooks*, *supra*, slip op. at 59. Because a capital sentencer now must be allowed appropriate discretion to impose a life sentence based upon any relevant mitigating evidence concerning the character of the defendant or the circumstances of the crime,[6] the sentencer should be restricted to using this discretion on a class of murderers that is demonstrably smaller and more blameworthy than those who commit less aggravated murders under state law.

In applying this constitutional requirement, the Court has analyzed various models and specific statutory schemes. The Court has prohibited states from considering any crime—no matter how narrowly defined—so serious that every person who commits it must be put to death. *E.g.*, *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating statute mandating death for life term prisoners who commit murder); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating statute mandating death for first-degree murders defined in the same manner as they are in Mr. Fretwell's case). Yet the Court, mindful of the need to direct and limit the sentencer's discretion, has required capital sentencing statutes to establish predictable standards for the purpose of aiding in the rational selection of who among those convicted of murder should be singled out for the ultimate and irrevocable penalty of death. *Zant*, 462 U.S. at 878.

States have chosen to perform *Furman*'s narrowing function in either of two general ways. A few states, such as Louisiana[7] and Texas, reacted to *Furman* by fine-

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[6] *E.g.*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1988).

[7] Leslie Lowenfield's brief traced the history culminating in enactment of Louisiana's modern capital statute. Brief for Petitioner, *Lowenfield v. Phelps*, No. 87-6867, at 41-42 n.25 (O.T. 1987). In 1976,

tuning their first degree murder statutes by requiring the jury at the guilt stage to convict the defendant of a new enhanced category of "capital murder," and then added further aggravating circumstances at the penalty phase. *Middlebrooks*, *supra*, slip op. at 60; Rosen, *supra*, at 1123.

The majority of post-*Furman* states, such as Florida, Georgia, and Arkansas, retained their traditional categories of first degree or malice murder, most obviously premeditated murder and felony murder. Rosen, *supra*, at 1122. These jurisdictions use aggravating circumstances in the penalty hearing to, in effect, establish an enhanced category, "aggravated first degree" or "malice murder." In these states, it is aggravating circumstances that perform the narrowing function demanded by *Furman*. Typically, after a jury finds the defendant guilty of capital or first degree murder, it retests the defendant's liability against a still narrower "super first degree murder" law by deciding whether the offender

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this Court invalidated Louisiana's post-*Furman* mandatory capital punishment statute. *Roberts v. Louisiana*, 428 U.S. 323 (1976). One year later, the Louisiana legislature explicitly amended its definition of *second*-degree murder to include all homicides where the offender has a specific intent to kill but where the aggravating circumstances listed in the capital sentencing portion of the statute were not present. *See* Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana*, 24 LOY. L. REV. 709, 738 (1978). The Louisiana Supreme Court subsequently interpreted this statutory change as an amendment by implication of the state's first-degree murder statute, so as to incorporate the sentencing aggravating circumstances into the definition of *first*-degree murder itself, because second-degree murder excludes such factors. *State v. Payton*, 361 So.2d 866, 870 (La. 1978). The Louisiana legislature then codified this interpretation in 1979. *See* Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 TUL. L. REV. 828, 861 n.108 (1979). Thus, the definition of capital murder in Louisiana provides for the narrowing function to occur at the guilt phase.

exhibited certain aggravating factors. The sentencer then weighs those aggravating factors against any mitigating factors about the crime or the offender and decides whether the defendant shall live or die.

Regardless of where in the bifurcated process the narrowing takes place, that narrowing function must be meaningful. Where aggravating factors are employed, those circumstances must possess genuine directive content; unconstitutionally vague aggravating circumstances do not satisfy the narrowing requirement of *Furman*, for example. *E.g.*, *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) (aggravating circumstance authorizing death if offense was "especially heinous, atrocious or cruel" held vague and so subject to unconstitutional application); *Sochor v. Florida*, 112 S. Ct. 2114 (1992) (same); *Shell v. Mississippi*, 111 S. Ct. 313 (1991) (same); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (same analysis applied to differently worded heinousness aggravating circumstance); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (same); *see generally* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases*, 64 N. CAR. L. REV. 941 (1986).

When aggravating circumstances are used as the class-narrowing device, these circumstances "must [] genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877. In *Gregg v. Georgia*, 428 U.S. 153, 195 (1976), the Court found Georgia's capital sentencing scheme constitutional on its face, in large measure because it provided for a "bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provide with standards to guide its use of the information." These "clear and objective standards," focusing on the specific circumstances of the crime and the character of the offender, are enforced through the requirement that the sentencer "find a *statu-*

tory aggravating circumstance before recommending a sentence of death." *Id.* at 197 (emphasis in original); *see also Zant v. Stephens*, 462 U.S. at 876 ("The approval of Georgia's capital sentencing procedure rested primarily on . . . [the requirement] that the jury . . . find at least one valid statutory aggravating circumstance"). A statutory aggravating circumstance "must satisfy a constitutional standard derived from the principles of *Furman* itself" in guiding the sentencer in the selection of whether one convicted of murder should live or die. *Zant*, 462 U.S. at 876.

Similarly, guilt phase narrowing, when employed, must be genuine. In states following the Louisiana and Texas models, capital murder is defined as "murder plus" some variable distinguishing it from the constitutionally-defined minimum baseline of first degree murder.

No one type of capital sentencing system is required by the Constitution. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). By the same token, as the eighth circuit recognized in *Fretwell v. Lockhart*, 946 F.2d 571, 575 (8th Cir. 1991), the reasoning of *Lowenfield v. Phelps* was grounded in the particulars of the Louisiana statute before the Court in that case. Regardless of whether the requisite narrowing takes place within the definition of capital murder, or whether it occurs by the use of aggravating circumstances, that narrowing of the death-eligible class must occur. And it must occur meaningfully.

C. In a Weighing State Like Arkansas, Where the Death-Eligible Class is Not Meaningfully Narrowed at the Guilt Phase, *Lowenfield v. Phelps* Does Not Govern.

Arkansas' post-*Furman* capital punishment scheme retained the traditional categories of first degree murder, premeditated murder and felony murder. Ark. Code Ann. (Supp. 1991) 5-10-101(a)(1) (Supp. 1991). Further,

the sentencing jury in Arkansas is required to impose the death penalty only if it unanimously finds that "aggravating circumstances *outweight* [*outweigh*] beyond a reasonable doubt all mitigating circumstances." Ark. Code Ann. § 5-4-603(a) (Supp. 1991) (emphasis added). Such weighing is a condition precedent to death sentences in Arkansas.

Either characteristic standing alone sufficiently distinguishes the Arkansas capital statute from the Louisiana statute at issue in *Lowenfield*.

1. *The First* Lowenfield *Difference: Unlike the Louisiana Statute at Issue in* Lowenfield v. Phelps, *Arkansas Does Not Meaningfully Narrow the Class of Death-Eligible Cases at the Guilt Phase.*

Lowenfield v. Phelps makes clear that states *may* choose to perform the narrowing function at the guilt phase, so long as the narrowing is meaningful. Examination of Arkansas' law shows that, unlike Louisiana, it has not done so.

a. *Arkansas' Traditional, Pre-*Furman *Felony Murder Doctrine: No Meaningful Guilt Stage Narrowing of the Death-Eligible Class.*

Arkansas' felony murder statute is typical of those jurisdictions which have not amended their statutes in reaction to *Furman v. Georgia*. The class of first degree murderers remains as before in the pre-*Furman* era; that class is narrowed in the sentencing phase by the mechanism of aggravating circumstances.

A person commits capital murder in Arkansas if "acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting

extreme indifference to the value of human life. . . ." Ark. Stat. Ann. § 41-1501(1)(a) (1977) (presently codified as Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1991))."

"[U]nder the current [Arkansas capital] statute, the narrowing primarily occurs at the penalty phase of the trial." *Johnson v. State*, 823 S.W.2d 800, 805 (Ark. 1992). After quoting Arkansas' current statute, the *Johnson* court reasoned that it "provides for the narrowing in the penalty phase of the trial. The Constitution requires no more than a narrowing of the death-eligible class in the penalty phase of a bifurcated trial." *Id.* (citing *Lowenfield v. Phelps*).[9] The court in *Johnson* also explained its decision in *O'Rourke v. State*, 746 S.W.2d 52 (Ark. 1988), a case decided soon after *Lowenfield* and a case interpreting an earlier, although indistinguishable, version of Arkansas' capital statute. Following a discussion of *Lowenfield*, the *O'Rourke* court concluded that "as was the case with Louisiana's death penalty law which was considered in *Lowenfield*, the duplicative nature of Arkansas' statutory aggravating circumstances did not render appellant's sentencing infirm since the constitutionally-mandated narrowing function was performed at the guilt phase." 746 S.W.2d at 56. The prisoner in *Johnson* cited *O'Rourke* for the proposition that "a narrowing of the death eligible class occurs during the guilt

[8] This is substantially different from Louisiana, where aggravating factors are part of the defintion of murder.

[9] The court's reasoning occurred as part of its rejection of Mr. Johnson's argument that the capital murder statute was facially unconstitutional, because it failed to narrow the class of persons eligible for the penalty of death. The court went on to reject Mr. Johnson's argument that the duplicate use of pecuniary gain as part of the definition of the offense and also as an aggravating circumstance violated the Constitution. Because his conviction was predicated on premeditated murder and not felony murder, Mr. Johnson was held to lack standing to raise the issue. *Johnson*, 823 S.W.2d at 806. Further, the court agreed with the eighth circuit that *Lowenfield v. Phelps* overruled *Collins v. Lockhart*. *See Johnson*, 823 S.W.2d at 806 (citing *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989)).

phase of the trial." *Id.* However, the *Johnson* court stated, "we did so write in *O'Rourke*, but that opinion discussed an earlier version of the statute. We did not discuss the possibility of the narrowing occurring in the penalty phase because we did not have to. But the statute has been changed, and under the current statute, the narrowing occurs primarily at the penalty phase of trial." *Johnson*, 823 S.W.2d at 805.[10] Discussing *Lowenfield*, the court reasoned that the "legislature previously narrowed the class in both ways but, under the 1989 amendment, has broadened the definition of the crime so that *the narrowing now primarily occurs at the penalty phase*." *Johnson, id.* (emphasis added)."[11]

[10] Under Arkansas law, all reckless felony murders satisfy the test for death-eligibility. Arkansas law requires that the defendant possess a specified *mens rea* of at least "extreme indifference to the value of human life." Ark. Stat. Ann. § 5-10-101(a)(1) (Supp. 1991). However, *all* felony murderers potentially meet such a recklessness standard; that is, one who purposely undertakes a dangerous felony that results in a death almost invariably can be found reckless. Therefore, the narrowing device in Arkansas is essentially no different from those in pure felony murder states—*i.e.*, from those jurisdictions that allow the defendant to be sentenced to death solely because the killing took place during an accompanying felony.

Further, *Tison v. Arizona*, 481 U.S. 137, 158 (1987), now places a nationwide threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty. The Tennessee Supreme Court recently reasoned that "all felony murderers" potentially meet a [*Tison*] recklessness standard." *State v. Middlebrooks*, *supra*, slip op. at 62-63. Since after *Tison* "the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully narrow the class of death-eligible defendants." *Middlebrooks, id.* at 63.

Because the absence of reckless indifference immunizes a defendant constitutionally, its presence cannot meaningfully further narrow the class of death-eligible defendants. Satisfying *Tison* cannot alone constitute meaningful narrowing.

[11] The court's reference to the 1989 changes to the Arkansas Code is puzzling, because the recodification alters the statute in no dis-

The Arkansas statute includes traditional, simple felony murder as capital murder in essentially the same fashion as Georgia [12] and Florida.[13] This Court in *Stringer v. Black* noted that *Lowenfield* had been concerned with the Louisiana statutory scheme, where the narrowing occurred at the guilt phase. The *Stringer* opinion was clear that *Lowenfield* would not govern either the Georgia or Florida models: "*Lowenfield*, arising under Louisiana law, is *not applicable here*." *Stringer*, 112 S. Ct. at 1138 (emphasis added). The Court contrasted the Louisiana scheme with the Georgia and Florida schemes, concluding

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cernably relevant way. Mr. Fretwell was convicted and condemned in 1985.

[12] *Gregg v. Georgia*, 428 U.S. at 162 n.4. Ga. Code Ann. § 26-1101 (1972) provided:

> (a) A person commits murder when he unlawfuly and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or imprisonment for life.

[13] *Proffitt v. Florida*, 428 U.S. at 247 n.4. Fla Stat. Ann. § 782.04 (1) (Supp. 1976-77) provided:

> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the preparation of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age of older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

that "[t]he State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error . . . *Lowenfield*['s] relevance to *Godfrey*, which it did not find it necessary to cite, or the line of cases following from *Godfrey*, is slight at best." *Stringer*, 112 S. Ct. at 1138-39.[14]

Mr. Fretwell's case illustrates the perverse operation of Arkansas' capital felony murder scheme. Mr. Fretwell was convicted of felony murder. The underlying felony was robbery. An essential element of robbery was the intent to obtain money. Though instructed on two aggravating circumstances, the jury found only the pecuniary gain factor present.[15] The jury thus sentenced Mr. *Fretwell* to death by finding an element of felony murder as an aggravating circumstance.

Under the State of Arkansas' *Lowenfield* rationale, it could also have statutorily identified as aggravating circumstances: 1) pecuniary gain; 2) in the course of a felony; 3) the victim was threatened with violence; and 4) an unjustified killing occurred. Under such a scenario, all the aggravating circumstances would exist in a felony (robbery) murder. Yet all these aggravating circumstances are "illusory" because they "create[] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be." *Stringer*, 112 S. Ct. at 1139. Certainly, the word "aggravating" in and of itself means that it must be a circumstance which is over and above first degree murder.

In *Stringer* the heinousness aggravating circumstance was held "illusory" because it was unconstitutionally vague. Here the pecuniary gain aggravating circum-

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[14] *Stringer v. Black* thus indicates that the eighth circuit's conclusion that *Collins* was overturned by *Lowenfield* was erroneous. *See infra* § C1b.

[15] The invalidation of the sole aggravating circumstance in a capital case invalidates the death sentence. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992) (one is innocent of the death penalty if "there was no aggravating circumstance or [if] some other condition of eligibility has not been met").

stance is illusory because it merely repeated an element of the predicate felony of robbery. It is this illusory nature of the pecuniary gain circumstance that tainted Mr. Fretwell's death sentence with error of constitutional magnitude. The jury weighed a phantom aggravating circumstance in its balance. The unmistakable message sent to the jury was that the pecuniary gain factor was a circumstance that *mattered* in its weighing, when in fact the circumstance added nothing to the felony murder conviction. In this sense the factor should have been treated as weightless, but the jury inevitably "found" it and weighed it nonetheless. This ephemeral aggravating circumstance cast the issue before the jury into a language of false legalism, and the resulting weighing thereby was skewed. *Cf.* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 375-83.

Such bootstrapping upon bootstrapping is not unique to Mr. Fretwell's case, although perhaps few other condemned Arkansas prisoners possess *only* the pecuniary gain aggravating circumstances in their cases. *Every* robbery felony-murder would include, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Arkansas' statute, violates the eighth amendment. An automatic aggravating circumstance is created which fails to meaningfully narrow.

If a defendant was convicted of robbery murder, he would then face mandatory statutory aggravation for pecuniary gain. This is too circular a system to meaningfully differentiate between who should live and who should die. Because an element of the crime was simply recycled as an aggravating factor, there was no "genuine [] narrowing [of] the class of death-eligible." *Stringer v. Black*, 112 S. Ct. at 1138. It additionally was used as weight; a thumb on the death side of the scale. Mr. Fretwell will show at § C2, *infra*, that Arkansas is a weighing state. In a weighing state like Arkansas, use of a duplicative aggravating factor in a "weighing process invalidates the sentence." *Id.* at 1140.

b. Lowenfield v. Phelps, *Felony Murder, and Murder for Pecuniary Gain in Arkansas.*

This case illustrates why commentators and at least three state supreme courts have criticized the felony murder rule as a bootstrapping device that makes defendants artificially death-eligible.[16] As the Tennessee Supreme Court put it only ten days ago, the doctrine "vaults an offense into the class of murders without the malice finding usually required, and then, still without any culpability finding, elevates what otherwise might not be a murder to first-degere murder." *Middlebrooks, supra*, slip op. at 62 (citing Rosen, *supra*, at 1127). In addition, in cases like Mr. Fretwell's, "a third level of bootstrapping arises as the felony murder defendant is moved up into the supposedly restricted class of defendants eligible for death." *Id.*

Problems of coherently narrowing the death-eligible class become especially complex in felony murder cases, as the felony murder rule disrupts the usual pattern of individualized scrutiny as well as all meaningful narrowing. The felony murder doctrine has the potential to equate any participant in the underlying felony with the cold-blooded deliberate killer no matter how unforeseeable the death or how attenuated that defendant's participation in the felony or the events leading to the death. Rosen, *supra*. In Justice O'Connor's words, felony murder is not limited to murder "as it is ordinarily envisioned." *Enmund v. Florida*, 458 U.S. 782, 812 (1982) (O'Connor, J., dissenting). In contrast to the winnowing out of the least culpable offenders through the application of the malice and premeditation deliberation standards of non-felony murder homicide law, the felony murder rule

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[16] *E.g.*, Finkel, *Capital Felony Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1980); Rosen, *supra*; Roth & Sundby, *The Felony-Murder Rule: A Doctrine at a Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985); Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356 (1978).

thrusts an entire undifferentiated mass of defendants into the category of the supposedly worst murderers eligible for the death penalty. Some of these defendants indeed may be among the most culpable offenders—for example, the cold-blooded executioner of a store clerk during a robbery—but many are not. Rosen, *supra*. It is precisely this lack of distinctions that requires that the most individualized attention be paid to these death-eligible felony murder defendants.

It is questionable whether the felony murder rule itself, or its subsidiary "pecuniary gain" aggravating circumstance, meaningfully narrow the death-eligible class of cases. With the notable exception of *State v. Middlebrooks*, *supra*, slip op. at 51-63, courts rarely have addressed in any detail use of the felony murder rule as a narrowing device, either alone or in conjunction with a broad pecuniary gain aggravating circumstance.

Arkansas broadly construes its pecuniary gain aggravating circumstance to include all felony murder cases where an underlying motive for monetary gain exists, including all robbery murders and most burglary murders. E.g., *Miller v. State*, 605 S.W.2d 430 (Ark. 1980) (pecuniary gain aggravating circumstance "not limited to a killing for hire, but is also clearly applicable to a murder committed during a robbery") (interpreting Ark. Code Ann. § 5-4-604(6) (Supp. 1991); *Woodard v. State*, 553 S.W. 2d 259, 265 (Ark. 1977) (en banc). Most Arkansas felony murderers are automatically death-eligible without any further narrowing required, because most felony murders occur during robberies or other crimes committed for monetary gain.

As one commentator has written of the pecuniary gain circumstance generally:

> [I]f the quality of the narrowing accomplished by a pecuniary gain narrowing device is perverse, the quality produced by a broad pecuniary gain narrowing device is doubly perverse. Like a felony murder narrowing device, a broad pecuniary gain narrowing device excludes most cold-blooded killers while simultaneously making unintentional killers and accomplices with varying degrees of culpability death-eligible. This represents the first level of narrowing. As with the pure felony narrowing device, a broad pecuniary gain narrowing device thus fails to pass constitutional muster because it does not identify those defendants more deserving of the death penalty as compared with other first degree murder defendants. A broad pecuniary gain narrowing device, however, goes one step further than the felony culpable defendants in the universe of felony murderers for imposition of the death penalty.
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> In addition to excluding most cold-blooded killers, a broad pecuniary gain narrowing device excludes defendants who kill during the course of certain felonies. Aside from robbery and burglary, the most common of these predicate felonies for first-degree felony murder are kidnapping, arson, rape, and sexual assault. Yet the fact that the victim's death occurred during the commission of any of these felonies should provide substantially more reason to impose a greater sentence than the fact that the defendant's motive was to obtain money or property.
>
> The terror suffered by the kidnap victim, the widespread danger to innocent lives and property caused by the arsonist, and the suffering and bodily violation endured by victims of sexual assault and rape—a defendant in all of these cases causes more harm and is demonstrably more culpable than the defendant whose underlying crime arises from a desire for gain. Of course, varying degrees of harm and culpability exist in all of these crimes, but, as a whole, it seems impossible to argue that one who kills out of a need for money is more deserving, or even equally deserving of a death penalty as compared with a rapist or a kidnapper who kills. Yet, along with the cold-blooded non-felony killers, these defendants are excluded by a broad pecuniary gain aggravating circumstance.

Rosen, *supra*, at 1131-34 (citations omitted).

Courts, both pre- and post-*Lowenfield*, have dealt with defendants facing death determinations after conviction of felony murder. The Supreme Court of North Carolina and the eighth circuit were troubled that when the penalty trial begins, defendants have no way of disproving the aggravating circumstance that the murder was committed during the course of an enumerated felony. *See State v. Cherry*, 298 N.C. 86, 257 E.E.2d 551 (1979); *Collins v. Lockhart*, 754 F.2d 258, 263-64 (8th Cir. 1985). *Cherry* held that it would be unfair for the state to get a "bonus" out of the proof of a robbery, so that the defendant automatically enters the penalty phase with one strike against him.

Similarly, in *Collins* the eighth circuit held prior to *Lowenfield* that Arkansas' "use of an aggravating circumstance that duplicates an element of [the] crime itself is a violation of the Eighth Amendment." *Id.* at 264. The court could "see no escape from the conclusion that an aggravating circumstance which merely repeats any elements of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain." *Id.* A jury which has "found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore the pecuniary-gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others." *Id.*

Following this Court's decision in *Lowenfield v. Phelps*, the eighth circuit abandoned *Collins*. In *Perry v. Lockhart*, 871 F.2d 1384, 1992-93 (8th Cir. 1989), the court concluded that "*Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Accord Johnson v. State*, 823 S.W.2d 800, 806 (Ark. 1992).

The eighth circuit "acted prematurely" in *Perry*. Rosen, *supra*, at 1135. To the extent that the reasoning of *Collins* assumed that narrowing must occur at the sentencing stage, *Lowenfield* plainly did overrule *Collins*. But *Lowenfield* did *not* validate the use of felony murder, or pecuniary gain, as a meaningful narrowing device. Those issues were not presented in *Lowenfield*, because in *Lowenfield*, there *was* a genuine narrowing—the defendant was convicted under a section of the Louisiana capital statute that provided for death-eligibility only for defendants who intentionally killed two or more people.

When states do not meaningfully narrow the class at the guilt phase—as, *amici* has shown, Arkansas does not—the logic of *Lowenfield* does not apply. The state supreme courts of Wyoming and Tennessee have so held in cases decided subsequently to *Lowenfield*.

In *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991), the Wyoming Supreme Court held that the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the eighth amendment. In *Engberg*, "the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain." *Id.* at 89. As a result, "the underlying robbery was used not once but *three* times to convict and then enhance the seriousness of Engberg's crime to a death sentence. *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position that the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the *Furman/Gregg* narrowing requirement." *Id.* (emphasis in original).

The Wyoming Supreme Court reasoned that "when an element of felony murder is itself listed as an aggravating circumstance, the requirement in [the statute] that at least one 'aggravating circumstance' be found for a death sentence becomes meaningless." *Id.* at 90. The

court approved of *Black's Law Dictionary*'s definition of "aggravation" as " 'any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself*'." (emphasis in original).

Most recently, on September 8, 1992, the Tennessee Supreme Court followed North Carolina in *Cherry* pre-*Lowenfield* and Wyoming in *Engberg* post-*Lowenfield*. The Tennessee court held that although felony murder continues to be a death-eligible offense, a finding of an aggravating circumstance *other than* the felony murder aggravating circumstance is necessary to support death as a penalty for the crime. *State v. Middlebrooks*, *supra*, slip op. at 51-67. After tracing the modern history of the capital felony murder doctrine, the court concluded that "in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when a defendant is convicted of first-degree murder solely on the basis of felony murder, the [felony murder] aggravating circumstance . . . does not narrow the class of death-eligible murderers under the Eighth Amendment . . . because it duplicates elements of the offense." *Id.* at 66.

For this reason the Tennessee Supreme Court held, as had the Wyoming Supreme Court before it, that *Lowenfield* does not govern its statutory scheme. The same reasoning applies in Arkansas, for it too is a state in which meaningful narrowing does not occur at the guilt phase. As *Amici* will show in the following subsection, *Lowenfield* does not govern Arkansas for a second, independent reason: Arkansas is a weighing state.

2. *The Second* Lowenfield *Difference: Unlike the Louisiana Statute at Issue in* Lowenfield v. Phelps, *Arkansas is a Weighing State.*

Arkansas' capital statute requires the sentencer to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The Louisiana statute at issue in *Lowenfield* did not. As *Stringer v. Black*, 112 S. Ct. 1130 (1992) demonstrates, the difference matters for purposes of the rule of *Lowenfield*.

Arkansas is a weighing state. Arkansas' capital statute provides that the jury "shall impose a sentence of death" if it unanimously finds "that aggravating circumstances exist beyond a reasonable doubt" *and* that "aggravating circumstances *outweight* [*outweigh*] beyond a reasonable doubt all mitigating circumstances" *and* that "aggravating circumstances justify a sentence of death beyond a reasonable doubt." Ark. Code Ann. § 5-4-603(a) (Supp. 1991) (emphasis added).

Interpretive caselaw reinforces the idea that Arkansas is a weighing state. The Arkansas Supreme Court explained in *Giles v. State*, 549 S.W.2d 479, 485 (Ark. 1977), that the "weighing process is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance." Citing two Florida cases, the *Giles* court observed that the sentencing decision is "a reasoned judgment to be exercised in the light of the totality of the circumstances. The sentencing authority does not act as a computer, but exercises a reasonable and controlled discretion." *Id.*; *see also Woodward v. Sargent*, 806 F.2d 153, 157 (8th Cir. 1986); *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988).

The Arkansas Supreme Court in *Giles* cited two Florida Supreme Court opinions in support of its interpretation of Arkansas' weighing statute. *Giles*, 549 S.W.2d at 485 (citing *State v. Dixon*, 283 So.2d 1 (Fla. 1973) and *Alvord v. State*, 322 So.2d 533 (Fla. 1975)). The cita-

tions to *Dixon* and *Alvord* are significant, because this Court treats Florida as a paradigmatic weighing state. In Florida, aggravating circumstances are used to both narrow the class of death-eligible and to guide the exercise of sentencing discretion in a consistent and predictable fashion. *Sochor v. Florida*, 112 S. Ct. 2114, 2119 (1992).

The identity between the statutes of Arkansas and Florida is important, because this Court has used Florida as a vehicle for exploring the constitutional significance of weighing. In *Stringer v. Black*, 112 S. Ct. 1130 (1992), the Court explained in dicta that the Florida capital sentencing statute, like the Mississippi statute before the Court in *Stringer*, requires the sentencer to weigh aggravating factors against mitigating factors in determining whether to impose life or death.

The *Stringer* Court underscored the "critical importance" of the distinction between weighing states and nonweighing states in assessing the effect of a sentencer's consideration of an invalid aggravating factor:

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body in a weighing state is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received

> an individualized sentence. This clear principle emerges . . . from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.

Id. at 1338.

The Court in *Stringer* stressed that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Id.* at 1139. Use of an aggravating factor "of vague or imprecise content" has a substantial impact upon capital sentencers who weigh aggravating and mitigating factors. *Id.*; *see also Espinosa v. Florida*, 112 S. Ct. 2926 (1992) ("if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances"). So does the use of an aggravating circumstance that repeats an element of the conviction.

The *Stringer* Court explained that the "principal difference between the sentencing schemes in Georgia and Mississippi is that Mississippi is what we have termed a 'weighing' State, while Georgia is not." *Stringer*, 112 S. Ct. at 1137. Under Mississippi law, after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, "it must weigh the aggravating factor or factors against the mitigating evidence. By contrast, in Georgia the jury "must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case." *Id.*

That Mississippi is a weighing state gave "emphasis to the requirement that aggravating factors be defined with some degree of precision." *Id.* at 1136. The Court

further noted that because Mississippi had adopted a weighing scheme patterned after Florida's statute (which was approved in *Proffitt v. Florida*, 428 U.S. 242 (1976)) decisions involving Florida capital cases were most relevant.[17] Because Arkansas likewise is a weighing state, this Court's decisions involving Florida cases are equally relevant.

Most significantly, *Stringer* discussed *Lowenfield*'s inapplicability to weighing states by comparing the non-weighing Louisiana statute at issue in *Lowenfield* with the Mississippi weighing statute at issue in *Stringer*. The Court noted that in Louisiana "a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria." *Stringer*, 112 S. Ct. at 1138 (citing *Lowenfield*, 484 U.S. at 242) (quoting La. Rev. Stat. Ann. § 14:30A (West 1986)). After determining that a defendant is guilty of first-degree murder, a Louisiana jury "next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine

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[17] Caselaw from totality-of-the-circumstances states, like Georgia, is applicable to weighing states, like Mississippi and Florida, because aggravating circumstances, under both models, perform the narrowing function. *Maynard v. Cartwright*; *Stringer v. Black*. Where the models warrant different treatment is in the analysis conducted of the consideration of an invalid aggravating circumstance. In weighing states, harmless error analysis must consider that an invalid aggravating circumstance has a second role in the sentencer's decisionmaking. As a result, as explained in *Stringer*, the harmless error analysis is different.

For purposes of Mr. Fretwell's case, this distinction does not matter. Where there is only one aggravating circumstance, both models require a reversal where that one circumstance was invalid. *Sawyer v. Whitley*, 112 S. Ct. at 2522.

whether the death penalty is appropriate." *Stringer*, 112 S. Ct. at 1138.[18]

Unlike the Mississippi sentencing process before the Court in *Stringer* or the Arkansas procedure before the Court here, in Louisiana the "jury is not required to weigh aggravating against mitigating factors." *Id.* at 1138. According to *Stringer*, the *Lowenfield* Court "went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase. We also contrasted the Louisiana scheme with the Georgia and Florida schemes." *Stringer*, 112 S. Ct. at 1138 (discussing *Lowenfield*).

After reiterating *Lowenfield*'s distinction between weighing and non-weighing statutes, the *Stringer* Court concluded that "[t]he state's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon." 112 S. Ct. at 1138.

Thus, Arkansas is a weighing state, and *Lowenfield* does not apply to weighing states.

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[18] *See* La. Code Crim. Proc. Ann., art. 905.3 (West 1984 & 1991 Supp.) (although jury must "consider" any mitigating circumstances, it is not required to weigh or balance the aggravating against the mitigating factors by any statutory standards; so long as a Louisiana jury finds that a single aggravating circumstance exists, it can sentence the defendant to death regardless of the presence of any mitigating factors); *see Flowers v. State*, 441 So.2d 707 (La. 1983) (citing *State v. Welcome*, 458 So.2d 1235 (La. 1983)) (holding that there is no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating); *but see State v. Lloyd*, 489 So.2d 898 (La. 1986) (some amount of jury weighing is implicit in the requirement that a jury "consider" mitigating circumstances).

CONCLUSION

Lowenfield v. Phelps does not govern Arkansas' capital sentencing scheme for two independent reasons. Arkansas does not narrow the death-eligible class at the guilt stage. Arkansas is a weighing state.

Respectfully submitted,[19]

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